

Senator Orrin Hatch's Floor Statement on Judicial Nominations – March 1, 2005

Mr. HATCH. Mr. President, as I listened to the distinguished Senator from West Virginia speak against filibuster reform, I wanted to make a few points that he did not say, at least as far as I could tell. I did not hear every word of his speech, but I did hear enough of it.

Number one, he did not say that killing judicial nominations by filibuster is part of Senate tradition, nor could he have said that because for the first time in history, we have had filibusters of judicial nominees. Only President Bush's judicial nominees have been filibustered by our colleagues on the other side, and in every case where they were filibustered, those nominees had majority support.

So filibustering judges is not a part of the tradition of the Senate, nor has it ever been.

Some have said that the Abe Fortas nomination for Chief Justice was filibustered. Hardly. I thought it was, too, until I was corrected by the man who led the fight against Abe Fortas, Senator Robert Griffin of Michigan, who then was the floor leader for the Republican side and, frankly, the Democratic side because the vote against Justice Fortas, preventing him from being Chief Justice, was a bipartisan vote, a vote with a hefty number of Democrats voting against him as well. Former Senator Griffin told me and our whole caucus that there never was a real filibuster because a majority would have beaten Justice Fortas outright. Lyndon Johnson, knowing that Justice Fortas was going to be beaten, withdrew the nomination. So that was not a filibuster. There has never been a tradition of filibustering majority supported judicial nominees on the floor of the Senate until President Bush became President.

Number two, if I recall it correctly, the distinguished Senator from West Virginia did not say ruling such filibusters out of order is against the rules. I do not believe he said that because it is not against the rules. At least four times in the past, some of which occurred when Senator *Byrd*, the distinguished Senator from West Virginia, was the majority leader in the Senate, there have been attempts to change the Senate's rules on the filibuster. Admittedly, I think in some of those cases the Senate backed down and changed the rules, but the effort was made to change the rules, and in the eyes of the Senator from West Virginia and others they should have and could have been changed by majority vote.

Let me say, in fact, all of the examples the Senator from West Virginia cited of legislative filibusters would not be affected by the constitutional option. That is a constitutional option that would allow judicial nominees an up-or-down vote.

That is a very important distinction because never before have judicial nominees been filibustered. Never before has one side or the other, in an intemperate way, decided to deprive the Senate as a whole from not just its advice function, but its consent function. We consent, or withhold that consent, when we vote up or down on these nominees.

Filibustering against the legislative calendar items has been permitted since 1917, and with good reason. I, for one, agree that this is a very good rule. But those filibusters happen on the legislative calendar. That is the calendar of the Senate; it is our legislative responsibility. The filibuster rule, Rule XXII, is to protect the minority. Frankly, I would fight for that rule with everything I have. But executive nominees, filibustering on the executive calendar is an entirely different situation. And it is one that was not addressed in Senator *Byrd's* remarks.

I myself had never looked at this very carefully until this onslaught of filibusters against 11 appellate court judges took place on this floor. Then I started to look at it, and others have, too, and we now realize there is a real disregard of a constitutional principle by these unwarranted and, I think, unjustified and unconstitutional filibusters. In these particular cases, every one of those people--every one--had a bipartisan majority waiting to vote on the floor. This distinction is ultimately the critical one. Should a minority be able to permanently prevent a vote on a majority supported judicial nominee? I think the answer is clearly no, and there is nothing in the distinguished Senator from West Virginia's remarks that contradict that conclusion.